UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CLEAR CHANNEL D/B/A OAK MOUNTAIN AMPHITHEATRE

Employer[1]

and **Case 10-RC-15344**

UFCW LOCAL 1657

Petitioner[2]

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Clear Channel, d/b/a Oak Mountain Amphitheatre, is located in Pelham, Alabama, where it is engaged in the business of promoting concerts and events at the Oak Mountain Amphitheatre and at various other locations in Alabama and Mississippi. The Petitioner, UFCW Local 1657, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of "all regular core employees assigned from the Pelham, Alabama office location." By written stipulation between the parties, Petitioner amended this description to seek "all regular stagehands, lighting, sound, and other entertainment set up and load out employees drawn from the pool of employees utilized by Pelham, Alabama based crews." A hearing officer of the Board held a hearing and the parties filed briefs with me.

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[1] The Employer's name appears as amended at hearing.

[2] The Petitioner's name appears as amended at hearing.

As evidenced by the written stipulation executed at the hearing and by the parties' arguments in their briefs, the parties disagree on the following two issues: "(1) which of the approximately 200 employees who had at least some employment in the stagehand position during the preceding 12 months have sufficient and reasonable expectation of reemployment to be included in the unit; and (2) the supervisory status of Sam Smithwick."

The Employer contends that all stagehands who worked at least two shows during the preceding 12 months are within the appropriate unit. The Employer also contends that Sam Smithwick is not a supervisor and is included in the unit. The Petitioner, contrary to the Employer, contends that only stagehands who worked at least 10 shows or 300 hours during the preceding 12 months have a reasonable expectation of reemployment sufficient to make them regular employees included in the unit. The Petitioner also contends, contrary to the Employer, that Sam Smithwick is a supervisor within the meaning of Section 2(11) of the Act and is excluded from the unit. The unit sought by Petitioner includes about 30 employees, while the unit proposed by the Employer would include about 150 employees.

I have considered the evidence and arguments presented by the parties on each of these two issues. As discussed below, I have concluded that the eligibility formula advanced by the Employer is too broad while the formula advanced by Petitioner is too restrictive. Instead, I shall order an election based on the formula set forth by the Board in Medion, Inc., 200 NLRB 1013 (1972). I have also concluded that Sam Smithwick is a supervisor within the meaning of Section 2(11) of the Act and should not be included in the unit. Accordingly, I have directed an election in a unit that consists of approximately 84 employees.

To provide a context for my discussion of these issues, I will first provide an overview of the Employer's operations. Then, I will present the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer promotes about 25 concerts and other events at the Oak Mountain Amphitheatre during its season between the end of March and mid-October. From its Pelham, Alabama Location, the Employer also promotes about 25 to 30 other shows and events that take place elsewhere throughout the year, at such locations as Birmingham, Huntsville and Montgomery in Alabama and Tupelo and Jackson in Mississippi. It employs 10 full-time staff including two executive directors, a box office manager, a marketing manager, a booker, two accountants, two "operations people," and a production manager. It is undisputed that these full-time employees are not included in the unit.[3] When promoting an event, the Employer contracts with an agency for a guarantee to the artists, packages the event, markets the event, sells tickets, and hires on-call stagehands as needed to work the event. The stagehands are supervised by a "Steward," which, as the Employer explains, means "supervisor" in the usage employed by this employer.

II. THE APPROPRIATE ELIGIBILITY FORMULA

Stipulated supervisor Mark Hanson has been the supervisory steward on many of the shows and events worked during the past calendar year. With some assistance, as described in the next section, Hanson is responsible for calling stagehands from a potential pool of about 200 employees. When an employee is called, he or she is free to accept or reject the call. Mark Hanson was not called to testify, but undisputed evidence shows that years of service, cooperation in making oneself available, skills and performance are factors which may influence who is called and in what order. Moreover, employees may recommend friends or acquaintances

[3] The parties also stipulated, and on the record I find, that Executive Director Gary Weinberger, Director of Production Joe Benintende and Supervisor Mark Hanson are supervisors within the meaning of Section 2(11) of the Act and are excluded from the unit.

for particular jobs, or the supervisory stewards may ask them if know any "buddies" who would like to work. Job needs range from only about 4 employees to more than 70.

Typically, stagehands assist the bands' crew in unloading equipment and moving it onto the stage, assembling equipment, and then disassembling the equipment and reloading it on trucks at the end of the night. Jobs may range from a single event on a single night to festivals lasting several nights with multiple stages manned by separate crews. Employees receive a minimum of 4 hours show-up pay, and some may work only this minimum in a day. Others, however, may work a total of 16 to 18 hours a day, including "load in" hours, "show" hours and "load out" hours. Even among employees called back to work more than one show, the number of hours worked by each stagehand in a calendar year varies greatly, from 8 hours to more than 800 hours. Many of those employees the Petitioner considers a "core group" who are called repeatedly and who work both Birmingham area and out-of-town events had hours that ranged from about 200 or 300 hours to about 600 or more hours during 2002.

The Employer excised wage data from the records it submitted, but testimony shows that there are some differences in pay depending upon experience and length of service.[4] None of the stagehand employees receive 401(k) or pension benefits, or any insurance except workers compensation. The stagehands frequently receive catered meals on the job and, when traveling to events outside the Birmingham area, are often furnished transportation by van to and from the

[4] The Employer's witness could only provide very general testimony regarding wages. The Petitioner subpoenaed this information along with other information relating to hours, jobs worked, addresses, phone numbers and social security numbers. As the Hearing Officer found, the Employer substantially complied with the more clearly relevant terms of the subpoena even though the hearing was held less than five working days after the subpoena was served. Substantially for the reasons stated on the record by the Hearing Officer, I conclude that the records supplied provide a sufficient basis for decision, and that the additional records at issue would not have changed the decision herein. Accordingly, the Hearing Officer properly denied Petitioner's request for a continuance pending receipt of additional subpoenaed records. After the hearing closed, Respondent filed a petition to revoke the Petitioner's subpoena which was dated November 29, 2002, but not received until December 3, 2002, more than 5 working days after the acknowledged date of service of the subpoena. However, based upon the foregoing conclusions, the issues raised by the petition to revoke are moot.

event and lodging at motels if overnight stays are necessary. If "locals" also work at such events, they receive the catered meals but not transportation and lodging.

The Board includes regular part time or on-call employees in a bargaining unit while excluding casual part time employees. The test for distinguishing between casual and regular employees includes "such factors as regularity and continuity of employment and similarity of work duties." Tri-State Transportation Co., 289 NLRB 356 (1988). As demonstrated by the careful distinctions made by the Board in Pat's Blue Ribbons, 286 NLRB 918 (1987), a balance must be struck between protecting the voting rights of employees with a reasonable expectancy of further employment while excluding those whose interest in or prospects for continued employment appear minimal or uncertain.

In the entertainment industry, the Board has held that it is necessary to devise eligibility formulas that take into account the uniquely irregular pattern of employment in much of the industry, while retaining the flexibility to tailor such formulas to the individual facts of each case. American Zoetrope Productions, Inc., 207 NLRB 621 (1973); Medion, Inc. 200 NLRB 1013 (1972). In American Zoetrope, relied upon by the Employer, the Board determined that all unit employees would be eligible to vote who were employed by the Employer on at least two productions during the year preceding issuance of the Decision and Direction of Election, providing they had not been terminated for cause or quit voluntarily prior to the completion of their last job.

In the present case, however, the formula favored by the Employer would include in the unit employees who had worked as little as 8 hours in an entire year. Moreover, the evidence shows that while there is considerable variability in hours, certain employees do form something of a core group whose seniority, experience and willingness to work have resulted in repeated call backs, transportation to and lodging at out-of-town events and the accumulation of hours

numbering in the 100's as opposed to single digits. Such employees have a significantly greater continuing interest in the terms and conditions of employment than an employee who works only 8 hours in a year.

As the Board has stated in DIC Entertainment, L.P., 328 NLRB, 660 (1999), citing Trump Taj Mahal Casino Resort, 306 NLRB 294, 296 (1992), "In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks 'to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer.'" Here, even if employed on more than one job, employees with a very limited number of hours have an insufficient "continuing interest in the terms and conditions of employment" to warrant inclusion as regular part time employees. This is especially so in view of the absence of any evidence offered by the Employer regarding precisely how its supervisors decide which employees to call from the "labor pool" and Petitioner's evidence that some of the more casual employees with limited hours are "buddies" brought in for larger jobs or students and other locals living in the vicinity of a particular venue with limited expectation of future employment at other venues.

Petitioner's proposed formula, on the other hand, which would require 10 shows or 300 hours in 12 months gives insufficient consideration to the importance the Board places on "optimum employee enfranchisement and free choice." For example, this formula would exclude some employees who worked 7 or 8 events with well over 100 hours during 2002. These employees perform the same work under the same supervision as the employees Petitioner calls the "core" group. Moreover, given the inherently irregular nature of the work, at least some of the employees with less than 10 shows or 300 hours surely have a real continuing interest in their terms and conditions of employment.

Taking into consideration all of the foregoing and the totality of the record, I conclude that, with one slight modification to suit the facts of this case, the eligibility formula set forth in Medion, Inc., 200 NLRB 1013 (1972) best balances the interest in giving "full effect to the voting rights of those employees who have a reasonable expectancy of further employment," Id. at 1014, while excluding those with no real continuing interest in the terms and conditions of employment offered by the Employer.

In Medion, the Board found eligible all employees who were employed by the Employer on at least two productions for a minimum of 5 working days during the year preceding issuance of the Decision and Direction of Election. I shall adopt this formula, except that I shall express the 5 working days as 40 hours. I make this modification because this record and the arguments of the parties show that "hours" worked rather than "days" worked is the more salient consideration. A formula expressed on working hours rather than working days is also more equitable in this case given the differences in the number of hours that employees may work in a "working day." Thus, an employee working the minimum 4 hours would have worked only 20 hours total in 5 working days, while an employee working 18 hours a day would have worked 90 hours before becoming eligible under a "five working day" formula. By expressing the 5 days as 40 hours, these extremes are eliminated.

Accordingly, I find eligible to vote all unit employees who were employed by the Employer on at least two shows or other events for a minimum of 40 working hours preceding the issuance the this Decision and Direction of Election, and who were not terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.[5]

[5] In its brief, Petitioner also argues for a geographical limitation based upon residence of employees within the union's jurisdiction. However, the Employer is located in Pelham, Alabama and from this office promotes shows and other events at various locations using a mix of traveling and local employees who perform the same work under the same terms and conditions of employment. These are the material facts, rather than employee residential address, as Petitioner recognized when it stipulated to inclusion of all regular stagehands

III. THE SUPERVISORY STATUS OF SAM SMITHWICK

As discussed in Section I above, stagehands are called to work and are supervised on the job by a supervisory "steward." According to the Employer, it uses the term "steward" to mean supervisor. Stipulated supervisor Mark Hanson is most often the supervisory steward on the jobs, but the Employer's records for the calendar year prior to the hearing also list Sam Smithwick as "Steward" or "Superv." for about 10 shows or events, either alone or with Mark Hanson. Typically, if not listed as steward or supervisory, Smithwick's name appears second, just after supervisor Mark Hanson's name, on the invoices showing employees who worked and their hours.

Employee witnesses testify that Smithwick assists Mark Hanson when Hanson is on the job and is steward when Hanson is not there. On various occasions employees have been specifically told that Smithwick is a steward. Smithwick has routinely obtained employee initials on timesheets and has directed their work both when assisting Hanson and when formally designated "steward." He tells employees which tasks to perform, when to take lunch, when to leave for the day and when to return to work. He has also called employees to offer them jobs and has been observed by employees assisting supervisor Hanson in making up the lists of employees to call.

The Employer presented no evidence with respect to Mr. Smithwick's status. However, it is clear from the invoices submitted by the Employer for other purposes and from employee testimony that Smithwick has been held out to employees as a supervisor and has exercised more than one of the indicia of supervisory status, including participation in hiring, responsible

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"drawn from the pool of employees utilized by Pelham, Alabama based crews." Moreover, it is well established that except as past bargaining history might bear on unit determination, a union's territorial jurisdiction and limitations do not generally affect the determination of an appropriate unit. Groendyke Transport, 171 NLRB 997, 998 (1968).

direction of work, and assignment of hours. Wolverine World Wide, Inc., 196 NLRB 410 (1972).

Accordingly, I find that Petitioner has met its burden of showing that Sam Smithwick is a supervisor within the meaning of Section 2(11) of the Act and shall exclude him from the unit.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular stagehands, lighting, sound and other entertainment set up and load out employees drawn from the pool of employees utilized by Pelham, Alabama based crews;
> EXCLUDING casual employees, ushers, ticket takers, office employees, concession employees, irregular seasonal employees, professional employees, stage managers, guards and supervisors as defined in the Act.

The Petitioner expressed a desire to participate in an election if the Regional Director determined that an eligibility formula for a unit other than that petitioned for was appropriate. In

accordance with usual practice, the Petitioner will be given 14 days from the date of this Decision and Direction of Election in which to demonstrate the requisite showing of interest among the eligible employees whom I find constitute a unit appropriate for the purpose of collective bargaining within the meaning of the Act. North Arundel Hospital Association, Inc., 279 NLRB 311, 312 fn. 10 (1986).

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by UFCW Local 1657. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed by the Employer on at least two shows or other events for a minimum of 40 working hours during the year preceding the issuance of this Decision and Direction of Election, and who were not terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause prior to the completion of the last job for which they were employed; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Birmingham, Alabama Resident Office, 1130 22nd Street, Suite 3400, Birmingham, Alabama, on or before December 31, 2002. No extension of time to file this list shall be granted except in

extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (404) 331-2858. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and regulations, the Employer must post the Notices to Election provide by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, DC 20570.

This request for review must be received by the Board in Washington by 5:00 p.m. EST on January 8, 2003.

Dated at Atlanta, Georgia, this 23rd day of December, 2002.

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